No. 76-1336

In the Supreme Court of the United States

OCTOBER TERM, 1976

HERBERT BLITZSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO: *The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States.*

The petitioner, Herbert Blitzstein, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit issued its judgment in the form of an unpublished order pursuant to Seventh Circuit Rule 35. The order, issued February 4, 1977, has not been and will not be officially reported. It is printed as Appendix A to this Petition. (App. 1) The order denying petitioner's timely Petition for Rehearing, entered on February 24, 1977, is printed as Appendix B to this Petition. (App. 8)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 2154(1).

STATUTORY PROVISION INVOLVED

Title 18, United States Code, Section 1955

§ 1955. *Prohibition of illegal gambling businesses*

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of

this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

STATEMENT OF THE CASE

Petitioner, Herbert Blitzstein, was indicted with five other defendants in a one count indictment charging violation of Title 18, United States Code, Section 1955. Said indictment was returned in the United States District Court for the Northern District of Illinois on October 8, 1974.

Prior to the trial, which was before a jury, one of petitioner's co-defendants pleaded guilty. Of the remaining five defendants who stood trial, one was dismissed on the government's motion prior to the close of its case in chief; one co-defendant was found not guilty by the jury; no verdict was reached concerning two of the co-defendants (mistrials as to them were ordered), and the government subsequently dismissed the indictment against both; only petitioner was found guilty by the jury, judgment was entered thereon, and a sentence of one year and one day incarceration was imposed.

STATEMENT OF FACTS

Witnesses for the Government

Testimony of Floyd Hays

Floyd Hays, an F.B.I. agent, supervised the interception of the wiretaps in this case between December 26, 1973 and January 9, 1974. (Tr. 32) Duplicate tapes of all the monitored conversations and a composite tape of certain selected conversations made from the duplicate tapes and the written transcripts of the conversations contained on the composite tape were identified by the witness. (Tr. 33-54)[1]

On December 3, 1973 Hays was on the 28th floor of an apartment building at 1636 North Wells, Chicago, when, at approximately 3:43, he observed the defendants Herbert Blitzstein and Morton Shapiro[2] enter the rear of the Eugenie Square apartment building. (Tr. 51-52) At approximately 3:47, he observed defendant Blitzstein in apartment 2412 using the telephone. A minute later he saw defendant Shapiro in the apartment. At 6:10, he saw defendant Blitzstein assembling bits of paper on a table in front of him. At 7:10 the light in the apartment went out and six minutes later he saw defendants Blitzstein and Shapiro leave the apartment building. (Tr. 52)

During the seven other times the witness conducted surveillance at the same apartment, he observed defendant

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[1] Wiretaps were placed on telephone numbers (312) 649-0724 and (312) 649-0753, both located at apartment 2412, in the Eugenie Square Apartments, 1662 North LaSalle Street, Chicago, Illinois.

[2] Shapiro was one of the co-defendants about whom the jury could not reach a verdict.

Blitzstein on one other occasion and defendant Shapiro on two other occasions. (Tr. 53) He saw the defendant Blitzstein on December 7, 1973 and defendant Shapiro on December 7 and 14, 1973. (Tr. 54)

Of the approximately 850 conversations transcribed, thirty to thirty-five were selected for the composite tape. (Tr. 62-63) Agent Hays and members of the United States Attorney's Strike Force selected the conversations contained on the composite tape. The composite was grouped according to individual. (Tr. 64)

The wiretaps were attached on December 28, 1973 and removed on January 10, 1974. No conversations were intercepted on January 10. 1974. (Tr. 78)

During the course of his surveillance, Agent Hays never saw defendant Sherman Goldman,[3] or Edwin Greenspan, Irving Gordon or James Rittenberg enter the building at 1660 North LaSalle. He did hear defendant Goldman speaking on the telephone from that building. (Tr. 83-84)

Testimony of Arthur R. Pfizenmayer

Arthur R. Pfizenmayer is an F.B.I. agent who conducted surveillance of Apartment 2412 of the Eugenie Square Apartments on December 3, 1973. (Tr. 98) He saw the defendants Blitzstein and Shapiro at that apartment building on December 3, 6, 7, 10, 12 and 16, 1973. He did not see them there on December 14, 1973. (Tr. 98-99) He saw them in the apartment itself on December 3, 7, 12 and 16, 1973. (Tr. 100) On December 16, 1973 he saw defendant Sherman Goldman in the apartment. (Tr. 101)

[3] Goldman was the other co-defendant about whom the jury was unable to agree.

Testimony of Daniel Dent

Daniel Dent is an FBI agent. On December 28, 1973, at 3:30 p.m. he was conducting surveillance of apartment 2412 in Eugenie Square Apartments. (Tr. 106) He observed defendants Blitzstein and Shapiro in the apartment, sitting at a table, making telephone calls and writing on paper. He observed them leaving the apartment at 7:50. (Tr. 107) He also saw defendants Blitzstein and Shapiro at the apartment on December 12 and 16, 1973. (Tr. 108) He saw the two defendants enter the apartment building on December 10 and 29, 1973, and defendant Blitzstein alone on December 31, 1973. The witness saw defendant Goldman at the apartment on December 16, 1973.

Testimony of Sherman Noble

Sherman Noble is an F.B.I. agent. (Tr. 110) On October 9, 1974 he and Agent Deaton went to the residence of defendant Goldmán and placed him under arrest. (Tr. 115) The witness stated that defendant Goldman told him, after the arrest, ". . . that the reason that he [Goldman] was involved in this is because he was doing favors to friends. . . ." Goldman also stated that what he was doing was not in violation of the illegal gambling statute because there were not five or more individuals involved. (Tr. 117)

Testimony of Irving Gordon[4]

Irving Gordon is in the leasing and financing business and resides in Skokie, Illinois. (Tr. 142)

[4] Gordon was considered to be a member of petitioner's bookmaking business by the Court of Appeals.

He had known defendant Goldman for eight or nine years. Goldman introduced him to defendant Blitzstein and Goldman and Blitzstein introduced him to defendant Shapiro. (Tr. 146-148)

In early October, 1973, Gordon was placing bets on football games with bookmakers named Gold, Mazur, Garris and defendant Blitzstein. (Tr. 148-149) They were all his own bets. Starting in September, 1973, he bet with Blitzstein during the entire football season. He had a telephone conversation with defendant Blitzstein in early October, 1973. (Tr. 149) Blitzstein asked Gordon if he had any more lines and if he could place any bets for Blitzstein. Gordon said he could do so and subsequently placed four or five bets for him ranging from $300 to $1,300 per game. Gordon continued placing bets for Blitzstein through the length of the football season. (Tr. 151) Gordon would place 10 to 20 bets with other bookmakers for Blitzstein. The amounts of the bets would be between $300 and $1,800 per game. Blitzstein would call Gordon and tell him what bets to make. (Tr. 152) Blitzstein would call Gordon back to confirm that the bets were made. A couple of times during the season, the witness would make bets for Blitzstein on both sides of a game. While making bets for Blitzstein, Gordon continued to bet with Blitzstein. (Tr. 154)

The witness remembered a telephone conversation he had with defendant Blitzstein in mid-October, 1973, in which Blitzstein asked him if he could place more bets, and said that he was associated with "Moe" [defendant Shapiro]. (Tr. 157)

Defendant Goldman told Gordon in early December, 1973, that he was going to help Blitzstein in the office to make phone calls. (Tr. 159-161)

Gordon made bets five to ten times at defendant Goldman's request and once or twice at defendant Shapiro's request. (Tr. 162) The bets would be for amounts between $300 and $1,800 per game. (Tr. 163)

When Gordon made bets for the three individuals, they would straighten up accounts in cash the following week. The settling would take place at a bowling alley or at defendant Goldman's store. (Tr. 164) Gordon saw Mr. Greenspan settle up with defendant Goldman at the bowling alley. (Tr. 165-166)

In his personal bets, Gordon would bet and settle up with defendants Blitzstein and Goldman. One total was kept. (Tr. 165) When he bet with other bookmakers for defendants Shapiro or Goldman the witness would settle up with defendants Goldman and Blitzstein. (Tr. 166) Blitzstein would call Gordon and they would settle up the amount due and owing.

The witness would occasionally settle up with the defendants for his friend, Mel Goodman. (Tr. 167) The witness would make 4 or 5 bets a week with defendants Blitzstein and Goldman for other persons. (Tr. 168)

The term "dollar" refers to a $100 bet. "Nickle" refers to $500. (Tr. 180) "Dime" refers to $1000. (Tr. 182)

When Gordon asked defendant Goldman if he was "writing a lot of business," Gordon was referring to football bets. (Tr. 181)

Gordon stated that he received a television set from defendant Blitzstein "for helping him." (Tr. 183) The television set was the only compensation he received from anyone. Defendant Blitzstein would give presents to many of his customers. (Tr. 186) As far as Gordon knew, the

only persons involved in the business were Goldman, Shapiro and Blitzstein. (Tr. 188)

Gordon had a bookmaking relationship with defendant Goldman which was separate and apart from the Blitzstein-Shapiro-Goldman relationship. (Tr. 189) He denied that he ever did not place a bet for defendant Blitzstein, but held it for himself. (Tr. 190) However, if he could make the Blitzstein bet at more favorable odds than Blitzstein expected, the witness would not tell Blitzstein about it. (Tr. 191-192)

Gordon made the bets for defendant Blitzstein, in part, because he wanted to find out which were Blitzstein's "hot" teams for his own betting selections. (Tr. 195, 204-205)

Defendant Goldman was Gordon's bookmaker until 1972 or 1973. (Tr. 197-198) Goldman did not engage in bookmaking between the time he told Gordon that he was leaving the business and the time he told Gordon that he was going to help out with the phones. (Tr. 198)

The witness stated that he was not in any way in business with defendant Blitzstein. (Tr. 199)

Gordon had been betting for twelve to fifteen years. (Tr. 202)

When Blitzstein stated to Gordon that he [Blitzstein] was "a follower" he meant that he follows information regarding games he was betting on.

Gordon had dealt with 20 to 30 bookmakers and never one as "sick" as Blitzstein. (Tr. 205) Blitzstein bet "with both hands" and was too busy making bets to man his bookmaking business. (Tr. 206)

Gordon both "bushed"[5] and "jacked"[6] games in his dealings with Blitzstein. He also "sided"[7] games. (Tr. 208-209)

When Blitzstein complained to Gordon that as much as he bet was as much as he took in, it was because Blitzstein did not wish to be at an even account. (Tr. 211)

When Goldman told Gordon that "we need Minnie," Goldman was referring to the private operation the two [Goldman and Gordon] had separate and apart from anyone else. When Goldman then stated "So do we," he was referring to himself, Blitzstein and Shapiro. (Tr. 213)

Depending on the points, it was not unusual for Blitzstein to bet on both sides of a game. (Tr. 217)

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[5] "Bushing" refers to a bettor placing a bet for another bettor at a more favorable than the source of the wager expects, wherein the first bettor keeps the advantage for himself. For example, if Blitzstein told Gordon to bet on the Bears at —6½ and Gordon could bet the game at —5½ he would do so and tell Blitzstein that the bet was made at —6½. If the game ended with the Bears winning by 6, Gordon would collect from both Blitzstein and the other bookmaker. Gordon referred to this situation as "a jack with no investment." (Tr. 193) See n.6, *infra*.

[6] "Jacking" is a device used by bettors which creates a possibility of a large reward with only a small risk. If Blitzstein had a game at —7 and another bookmaker had it at —5, Gordon would place bets with both bookmakers. If the game fell at 6, Gordon would win from both; if it fell at 5 or 7 he would win one and tie one; if there was any other result, all Gordon would lose would be the 10% commission on the losing bet.

[7] "Siding" is similar to jacking except that the point spread is only one point different between the two bookmakers. The bettor's goal here is a win and a tie, but the risk remains just the 10% commission on the losing bet.

Gordon thought that it would be possible that Blitzstein would bet against his opinion because the office figure was against his opinion. (Tr. 219-220)

Testimony of Edwin Greenspan

Edwin Greenspan had a conversation with defendant Goldman in September, 1973. (Tr. 223) Goldman told the witness that he [Goldman] was out of business and that, if Greenspan wanted an "out"[8] for the coming football season, he could make bets with defendant Blitzstein. (Tr. 224) Greenspan began betting with Blitzstein after talking to Goldman. (Tr. 225) He would bet six to seven games per week, wagering between $100 and $1,000 per game. (Tr. 226) Greenspan and defendant Goldman would settle up on Thursday evenings on the bets made with Blitzstein.

During the third week of the football season, defendant Blitzstein asked Greenspan if he knew of any other bookmakers' lines. The witness told Blitzstein the lines of other bookmakers including that of the defendant Anthony Cassel. (Tr. 227) Following this, defendant Blitzstein asked the witness to make some bets for him with other bookmakers. The witness agreed and made bets for Blitzstein until January 1, 1974. (Tr. 228) Defendant Goldman and Shapiro would also ask the witness to make bets for them and tell them the line. (Tr. 230) Greenspan began by placing about $2,000 in bets per week for Blitzstein. After about six or seven weeks that amount increased to $500 to $2,000 per game on two to eight games per week. (Tr. 228-229) Greenspan told Blitzstein and the other bookmakers that he would not be responsible for the bets he placed for Blitzstein. (Tr. 229) Greenspan would settle up the bets once a week with defendant Goldman. (Tr. 231-232) One account was kept for the bets made for Blitzstein, Shapiro, and Goldman. (Tr. 231) Occasionally defendant Blitzstein would come to the bowling alley and speak with defendant Goldman. (Tr. 232)

[8] An "out" is a person who will accept bets.

Greenspan was not a partner of Blitzstein, Shapiro or Goldman. (Tr. 249) He never received any compensation from any of the three, only a pair of cufflinks as a Christmas gift. (Tr. 251)

Greenspan was nothing more than a bettor or player throughout this period. He met Goldman at the bowling alley on Thursday nights, because that was Goldman's regular league bowling night. (Tr. 252-253)

Greenspan made bets for Blitzstein because he believed that Blitzstein had good and accurate information. Greenspan bet into Blitzstein throughout this whole period. (Tr. 254)

Sometimes, when betting for Blitzstein, Greenspan would add his own funds to those of Blitzstein and make one joint bet. (Tr. 255)

Betting is a hobby for Greenspan. (Tr. 259) In his 20 years of dealing with bookmakers he never confronted a situation like this one. (Tr. 262)

Testimony of James Rittenberg

Rittenberg is part-owner of a nightclub. (Tr. 301) In the fall of 1973, he had a conversation with defendant Shapiro in which Shapiro told him that Rittenberg could place bets with Shapiro. (Tr. 302-303) Rittenberg placed bets with Shapiro during the 1973-74 football season. He usually bet $50 or $100 a game and bet on two or three games each Saturday and Sunday. In October, 1973 Rittenberg told Shapiro that he had friends who would like to bet. Shapiro agreed that Rittenberg could make bets for his

friends. (Tr. 304) Two or three of Rittenberg's friends would call Rittenberg and Rittenberg would place their bets with Shapiro. This occurred during December, 1973, and January, 1974. The friends would bet on the line provided by Shapiro. (Tr. 306) Rittenberg assigned each bettor a number so that Shapiro would not know their names. The only exception was Witz. Witz would bet two or three games each Saturday and Sunday for $500 a game.

Shapiro and Rittenberg could settle up accounts once a week at Rittenberg's apartment.

Shapiro knew Rittenberg's financial condition, so he set a limit on the amount Rittenberg could bet. No limit was set on the amount Rittenberg could pass on in others' bets. (Tr. 307)

Rittenberg is 32 years old and had been betting since he was seven. (Tr. 312-313) He does not consider himself a bookmaker. He did, at one time, accept bets from Shapiro on basketball. (Tr. 313-317)

Rittenberg never got paid by Shapiro for giving him bets. (Tr. 314) Occasionally a friend's bet would not end up with Shapiro; Rittenberg would keep it. It was a way for Rittenberg to make a bet. (Tr. 315) Rittenberg also invented some "numbers" (as code names for fictitious bettors) so he could make bets in excess of the limit imposed by Shapiro. (Tr. 315-316)

Rittenberg did not feel obliged to forward all of his friends' bets to Shapiro. (Tr. 316)

Testimony of Charles J. Witz

Charles J. Witz, an attorney, placed bets with defendant Blitzstein and, on very rare occasions, with defendant Goldman during the period from September, 1973 to January, 1974. (Tr. 339-340) Witz knew Blitzstein as "Dave."

(Tr. 340) Blitzstein would call Witz to tell him the line and Witz would bet then or call Blitzstein later. (Tr. 341) The account would generally be settled up at Witz's office by Blitzstein. (Tr. 343)

Witz would bet between $500 and $2,000 per game and, on an average, between 8 to 10 games per week. (Tr. 343)

The witness also placed bets with Mr. Rittenberg by telephone. (Tr. 344) Rittenberg told Witz that he was not keeping the bets himself but giving them to someone else. (Tr. 346) Witz did not share in any business venture with Blitzstein. (Tr. 350) The witness looked to Rittenberg for payment on bets that he made with him, (Tr. 353) but he did not regard Rittenberg as his bookmaker. (Tr. 352)

Blitzstein had a reputation for getting information and being sharp and people were interested in what Blitzstein was doing as a bettor. (Tr. 355)

Blitzstein was "flamboyant in his approach" to bookmaking—taking positions contrary to those taken by everyone else. (Tr. 357) Blitzstein was aggressive, took betting positions, and did not wait to make money on the "vig."[9] (Tr. 358)

Testimony of Norman Meisel

Norman Meisel was a buyer and former druggist who took bets from defendant Blitzstein between October or November, 1973 and January, 1974. (Tr. 328) Meisel then placed the bets with his cousin. (Tr. 329) Meisel told Blitzstein the line being used by Meisel's cousin. (Tr. 329) Meisel would settle up each week with defendant Blitzstein.

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[9] The "vig" or "vigorish" is the 10% commission paid to the bookmaker on losing bets.

Blitzstein would bet between four and six thousand dollars on football games through Meisel. (Tr. 330)

Meisel received no compensation for placing defendant Blitzstein's bets; he felt that he was doing a favor for Blitzstein. (Tr. 336)

Testimony of R, Philip Harker

R. Philip Harker, an F.B.I. agent, testified as the government's expert on gambling. He stated that sports betting is primarily based on the line, that is, a number of points either added to the underdog's score or subtracted from the favored team's score which will supposedly equalize the two teams for betting purposes. (Tr. 392-393) Bettors generally bet with bookmakers at the rate of 11 to 10; that is, if the bettor wins a $100 bet the bookmaker will owe him $100 and if the better loses, he will owe the bookmaker $110. (Tr. 392)

Because of the 11 to 10 odds, there are a number of ways that bookmakers try to make a profit. They often try to achieve an absolute even balance of bets on both sides of a game, insuring them a 10% profit. (Tr. 392-393) The bookmaker has two means to achieve this even ratio. The first is to change the line to encourage betting on one team and discourage betting on the other. (Tr. 393) The second method to achieve the desired balance is by layoff betting. Agent Harker defined a layoff thusly:

> ". . . layoff is simply a bet by one bookmaker with another bookmaker in an effort to tend to achieve what the bookmaker feels is a desirable ratio of betting on both sides of the game."

Harker stated that the desirable ratio may not be an even balance as a bookmaker may wish to take a risk on a particular game.

Agent Harker stated that a bookmaker tries to get the "Las Vegas line" at the inception of his betting. The

bookmaker would then alter the line to fit his own needs. (Tr. 394) A line is absolutely essential to a bookmaker as well as is his knowledge of other bookmakers' lines. The bookmaker wishes to know other bookmakers' lines because he wants to know how their bets are coming in and what line he will have to layoff at. Line information is generally disseminated by telephone. (Tr. 395)

Layoffs are normally made throughout the betting period; sometimes even before a bookmaker has any bets on a particular game. He will either make these early layoffs in anticipation of his bettors' action or because he wishes to assume a gambling position on the game. (Tr. 396-397)

Bookmakers sometimes find it necessary to bet on both sides of a game to keep their desired balances. This is called "buying back a bet." (Tr. 398)

When a bookmaker lays off a bet, he must give up the 11 to 10 odds. (Tr. 399)

Occasionally, a bookmaker will use someone else to bet for him because the bookmaker wishes to keep the source of the bet a secret. This is commonly called the "beard situation." A bookmaker may bet more then he takes in on a particular game in order to create an imbalance because he wishes to take a risk on one side of the game. (Tr. 400-401)

Most wagers to a bookmaker are made by telephone. There are a number of slang expressions indicating the amount being bet—"quarter" ($25), "half" ($50), "dollar" and "buck" ($100), "two dollars" ($200), "five cents" or "nickle" ($500), "dime" ($1,000), "big nickle" or "large nickle" ($5,000). (Tr. 402)

Bookmakers settle up with each other either at a specific time or when the debt between them reaches a specific amount. (Tr. 403)

A "lay" bet or a "take" bet (giving or taking the points) can also be a layoff bet. (Tr. 404) Bookmakers rarely use specific words when making layoff bets. (Tr. 405)

Agent Harker examined the tapes and transcripts of the instant case and reached certain opinions. (Tr. 411) He believed that a gambling business existed. (Tr. 413) It was his opinion that wagers were placed on football games between December, 1973 and the beginning of 1974 and some basketball games after January 1, 1974. He also had the opinion that the business handled in excess of $2,000 on at least one day. That day was December 31, 1973. (Tr. 415)

Agent Harker's opinion was that the gambling business received line information from "John" in the western part of the country and that the partnership exchanged line information among themselves. (Tr. 416)

Agent Harker's opinions were: that defendants Shapiro and Goldman assisted Blitzstein directly; defendant Malmenato assisted Blitzstein by placing layoff bets of the operation with other bookmakers;[10] that Rittenberg funneled bets to the operation as an agent; that Gordon took bets as a bookmaker and also bearded Blitzstein's layoffs; that Greenspan's and Meisel's roles were the same as Malmenato's; and that all the bets made by Gordon, Greenspan, Meisel and Malmenato for Blitzstein were related to Blitzstein's bookmaking business. (Tr. 416-423)

Agent Harker only listened to selected portions of the tapes two weeks prior to testifying. The government selected the portions which he listened to. (Tr. 427-428)

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[10] The jury disagreed: Malmenato was found not guilty.

Agent Harker testified that Blitzstein made layoff bets on three football games, which involved the teams of Houston, Tulane, Tuburn and Texas Tech. Houston played Tulane in one of the games. (Tr. 478) However, he never compared the bets made by Blitzstein with Blitzstein's bookmaking balances for any game. (Tr. 499-536) Harker stated that there was no way he could reach an overall figure. (Tr. 499-500) He stated that this was not necessary to determine if a bet was a layoff. (Tr. 500)

Agent Harker stated that a bookmaker cannot make a bet without it being a layoff. (Tr. 518-519)

A "beard" usually shares in the profits of the actual bettor. (Tr. 513)

"Layoff" is a term of art, subject to interpretation. (Tr. 526) Harker considered any bet made by a bookmaker which has the effect of getting him into the financial situation he wishes to be in as a layoff bet. (Tr. 544-545)

A bookmaker's line changes for many reasons. Blitzstein changed his line frequently. (Tr. 547) Lines vary from city to city and region to region. (Tr. 552)

Harker seriously doubted that Blitzstein ever asked anyone to make a bet on a team he did not personally expect to win. (Tr. 556-557)

Witness for the Defense

Testimony of Sherman Goldman

Goldman is a defendant in the case. He owns a hotdog stand in Chicago. (Tr. 654)

Prior to April, 1973 he was a bookmaker. He began bookmaking in 1952. (Tr. 655) Goldman discussed some of the terminology of bookmaking, the procedures of the business, and the practice of layoff betting. (Tr. 656-658) He described layoff betting as a method used by book-

makers to avoid gambling on a particular game. He has never known a bookmaker to make an "anticipatory layoff." (Tr. 659) He had never heard of the term or the practice until this trial.

A layoff bet merely transfers a customer's bet from one bookmaker to another; it is not a bookmaker's own bet. (Tr. 660) He has never heard of a bookmaker using a "beard" to place a layoff bet. (Tr. 661)

Goldman was tendered to the court as an expert on gambling. (Tr. 667)

Irv Gordon was a customer of Goldman when he was a bookmaker. (Tr. 669) When Goldman quit the business, he told Gordon to contact Blitzstein. (Tr. 670) Basically the same procedure was followed with Goldman's former customers, Greenspan and Witz. (Tr. 670-674)

In early December, 1973 Blitzstein called Goldman and told him that he (Blitzstein) was too busy on the phone making bets and he needed someone to handle his customers. (Tr. 674) Goldman did so on Sundays during the football season. He stopped doing so on January 1, 1974. (Tr. 675)

The witness handled the settling up of gambling debts between Blitzstein and Gordon and Greenspan at a bowling alley on Thursday nights. (Tr. 676-677)

Goldman was shown a chart of incoming bets on particular football games and bets made by Blitzstein on those games. (Tr. 680) He explained that the fluctuation in the line occurred to keep the bets even until Blitzstein decided which team he favored in the game. Then, Blitzstein set the line to encourage betting on the side he thought would lose, disregarding the prevailing line used by other bookmakers. (Tr. 683)

In the Minnesota-Dallas football game, Blitzstein favored Minnesota. He adjusted his line accordingly. The

customers bet $1150 on Minnesota and $8700 on Dallas. (Tr. 683)

Blitzstein adjusted his line because he wanted to gamble, not, as in the usual case, because he wanted to reduce his risks. (Tr. 684) On the Minnesota game, Blitzstein also made personal bets on Minnesota of $3,800. (Tr. 685) These were not layoff bets. (Tr. 686)

On the Ohio State-Southern California Rose Bowl game, Blitzstein received $8,650 in bets on Ohio State and $10,625 in bets on Southern California. If Blitzstein was going to layoff on the game, he would have bet $2,000 on Southern California. (Tr. 687) In fact he bet $6,050 on Ohio State. (Tr. 688)

In the Texas-Nebraska Cotton Bowl game, Blitzstein's bettors had wagered $7,100 more on Nebraska than on Texas. Instead of laying off the excess, Blitzstein bet an additional $4,900 on Texas, which increased rather than decreased the risk. (Tr. 689)

In the Missouri-Auburn game, there was a rumor that five Missouri players would not play. Blitzstein accepted $100 in bets on Missouri and $2,750 on Auburn. Blitzstein had the same information so he bet all that he could on Auburn, about $5,000. He adjusted his line to get people to bet on Missouri. The bets were not layoffs because Blitzstein did not stop when he evened up his books, but created a risk for himself on Auburn. (Tr. 690-691)

In the Texas Tech-Tennessee game, Blitzstein's bettors had bet $750 more on Tennessee. Instead of laying off, Blitzstein bet an additional $1,900 on Texas Tech. (Tr. 692)

In the Tulane-Houston game, the bettors favored Houston by $1,700. When Blitzstein was finished betting on the game he had $5,600 risked on Tulane. (Tr. 693-694)

It was stipulated that the witness' testimony would be the same in respect to five or six other games. (Tr. 694-695)

The witness never knew Blitzstein to layoff any bets. Regardless of how his bets were coming in, Blitzstein would bet whatever he could through whatever sources he could on the team he preferred. (Tr. 695)

Evidence Contained in the Wiretap Transcripts

12/29/73 649-0753

10:07 a.m. John LNU to Blitzstein

John LNU called Blitzstein long distance and gave Blitzstein a line on nine football games. John said that he would call back.

11:10 a.m. John LNU to Blitzstein

John LNU called Blitzstein and gave him a revised line; two games having been changed.

10:45 a.m. John LNU to Blitzstein

John LNU called Blitzstein with a change on one game's line.

3:32 p.m. John LNU to Shapiro

John LNU called Shapiro and told him of a number of line changes and made two bets.

5:45 p.m. John LNU to Blitzstein

John LNU called Blitzstein with a line change on one game.

1/1/74 649-0753

11:15 a.m. John LNU to Blitzstein

John LNU called Blitzstein and told him the line on a number of games.

12/31/73 649-0753

3:32 John LNU to Shapiro

John LNU called Shapiro and told him of a line change on one game.

12/28/73 649-0724

11:37 a.m. Blitzstein to Malmenato

Malmenato tells Blitzstein the three lines he has received on a number of football games. Blitzstein tells him what lines to place bets at and on which teams. The two discuss the bets they have made on some of the games and how the lines on the Minnesota-Dallas game are different than the line being used elsewhere. Malmenato replies that Blitzstein does not have to bet.

11:48 a.m. Blitzstein to Malmenato

Blitzstein tells Malmenato that he wants to bet on Texas Tech, laying three points.

11:56 a.m. Blitzstein to Malmenato

Blitzstein calls Malmenato to check on whether or not the bets were made. Malmenato was able to confirm some of the bets and was waiting to hear on some others. Blitzstein tells him to keep betting on Texas-Tech.

12/29/73 649-0724

11:43 a.m. Blitzstein to Greenspan

Blitzstein called Greenspan to discuss the rumor that five starting players for Missouri were suspended and would not play against Auburn. Blitzstein was using a

line that was the same as one other bookmaker and one point lower than that used by a third bookmaker. Blitzstein tells Greenspan to bet with the bookmaker using the higher line. Blitzstein tells Greenspan that is "buried" with the Texas Tech game. Greenspan makes two bets with Blitzstein. Blitzstein tells Greenspan to "get me some Auburn." Greenspan replies "I'll do my very best."

12/30/76 649-0724

11:46 a.m. Goldman to Greenspan

Goldman calls Greenspan and asks about two games. Greenspan tells Goldman that the point spreads are 2 and, he thinks, 7. Goldman tells Greenspan that they are using 2½ and 7. Goldman asks if anyone is using 1½. Greenspan told Goldman that, prior to the date of the conversation he made some bets at plus 1½ on Minnesota. Goldman told Greenspan that the game is still a "pick it" out West. Greenspan asks Goldman who the bettors are playing in the Oakland-Miami game. Goldman replied that the bettors were playing both sides, but "we're favoring Miami . . . we want Oakland money today." Goldman tells Greenspan that "we're going to end up with a big decision here" on Minnesota.

2:30 p.m. Blitzstein to Greenspan

Blitzstein calls Greenspan and asks him to make bets on Oakland. Blitzstein complains that he does not have enough bets on the game. Greenspan says that he would try to make the bets.

2:52 p.m. Blitzstein to Greenspan

Blitzstein calls Greenspan and finds out that Greenspan was able to get $500 bet for Blitzstein. They also discussed who would win the probable Minnesota-Miami Super Bowl game.

12/31/73 649-0753

5:38 p.m. Blitzstein to Greenspan

Blitzstein calls Greenspan and finds out that the line on the Notre Dame game is 6½. Blitzstein said that he may need some Notre Dame money at that number because, even though he dropped his line to six, they were still betting on Notre Dame.

1/1/74 649-0724

11:25 a.m. Goldman to Greenspan

Goldman calls Greenspan and gives him a figure. Greenspan replies, "It ain't my play baby; that's his play." Goldman tells Greenspan the line on three college bowl games and the Super Bowl. They discussed lines being used elsewhere. Greenspan tells Goldman that he likes Texas, Ohio State and Penn State in that day's games. Goldman says that they will be pulling for him on all three games. Goldman tells Greenspan to bet on Penn State and Ohio State, laying the points.

12:11 p.m. Blitzstein to Greenspan

Blitzstein calls Greenspan and finds out that Greenspan has bet $1,500 for him on Ohio State. Blitzstein tells Greenspan that the line is different out West on all the games, with a marked difference on the Texas-Nebraska Cotton Bowl game. Blitzstein tells Greenspan to get him all he can on Ohio State. Greenspan says the most he could get is another $1,000. Blitzstein complains that he wants to stay with Penn State but that is all that his bettors are taking. Blitzsten then tells Greenspan to try and bet on Penn State and forget Ohio State because he had just gotten a big play on that game.

12:28 p.m. Blitzstein to Greenspan

Blitzstein calls Greenspan and Greenspan tells him that he got $1,000 bet for him. Blitzstein complains that he

cannot stay heavy on the game. They discussed another bookmaker who Blitzstein admired because he kept his opening line throughout the entire betting period.

1/5/74 649-0724

2:52 p.m. Shapiro to Greenspan

Shapiro calls Greenspan and tells him that he wants to make a play on the East-West game. Greenspan does not know the line on the game. Shapiro tells him to lay 3 on the game if he can for $500.

12/29/73 649-0753

2:01 p.m. Blitzstein to Gordon

Blitzstein calls Gordon to review the bets made by Blitzstein. Blitzstein complains that all he has are "nothing games" because as much as he bets his bettors bet back to him.

12/30/73 649-0724

11:30 a.m. Goldman to Gordon

Goldman calls Gordon. Gordon asks Goldman if he is getting a lot of business and for the line on two games. He then asks Goldman who Herbie is favoring. Goldman replies, "Oakland and Minnesota." Gordon tells Goldman the line being used by three other bookmakers. Goldman tells Gordon to bet $1,000 on one of the games. All that Gordon could bet was $500 at the line Goldman desired. Goldman also had Gordon bet $1,300 on Minnesota.

12:15 p.m. Goldman to Gordon

Goldman calls Gordon. Gordon asks who "we" need. Goldman responds "Minnie" but does not know for how much. Gordon then asks who "you" need,—who does "your office" need. Gordon said that he and Goldman need Minnesota and Oakland. Goldman responds, "So do we." Gordon asks about his television. Goldman tells Gordon

that there was a $10 difference between their figures for the previous day's plays.

2:30 p.m. Blitzstein to Gordon

Blitzstein calls Gordon and tells him that he [Blitzstein] is a "follower," and that he needs Minnesota and Oakland. Gordon tells Blitzstein that he could probably get $300 bet on Oakland. Blitzstein tells him to try.

2:34 Blitzstein to Gordon

Blitzstein calls Gordon and finds out that Gordon had bet $500 for him on Oakland. Blitzstein asks with whom, but Gordon does not tell him. Blitzstein asks Gordon to bet more for him. Blitzstein asks Gordon if he had gotten his television set. Gordon says no. Blitzstein assures Gordon that he will get one.

12/31/74 649-0724

6:11 p.m. Blitzstein to Gordon

Blitzstein calls Gordon and tells him that he needs Alabama in the evening's game. He tells Gordon to make a bet on Alabama although he had earlier bet on Notre Dame because he wanted "a decision, one way or the other." Gordon tells Blitzstein that he made a $1,000 bet for him on Alabama. Blitzstein tells Gordon that he now has $11,500 against $9,500; "a $2,000 decision." Blitzstein complains that this "don't mean shit."

1/1/74 649-0724

11:20 a.m. Goldman to Gordon

Goldman calls Gordon and gives him the line on four games. They check the figure and Gordon tells Goldman the lines being used by three other bookmakers. Goldman tells Gordon to bet $1,800 on Texas and $500 on Penn State.

2:08 p.m. Blitzstein to Gordon

Blitzstein calls Gordon and Gordon bets $500 on Nebraska. Blitzstein asks if that is Gordon's own bet and Gordon said no, it was for someone else who waited for an hour trying to call. Gordon also made another bet. Gordon told Blitzstein to tell Goldman to call a bettor who wanted to make a bet. Blitzstein told Gordon to bet $1,000 on Ohio State.

12/30/73 649-0724

11:46 a.m. Shapiro to Rittenberg

Shapiro calls Rittenberg and tells him the line.

11:50 a.m. Shapiro to Rittenberg

Shapiro calls Rittenberg and tells him of a change in the line.

12:07 p.m. Shapiro to Rittenberg

Shapiro calls Rittenberg and the latter gives him two bets for "#6." The two review the balances of bettors referred to by number.

12/29/73 649-0753

10:11 Blitzstein to Meisel

Blitzstein calls Meisel and Meisel tells him the line. Meisel hears someone else on the phone, but Blitzstein tells him that it was "Moe." Blitzstein tells Meisel to make four bets at $1,000 each for him.

12/30/73 649-0753

12:53 or 2:53 p.m. Blitzstein to Meisel

Blitzstein calls Meisel and tells him to make a bet on Oakland for as much as he can.

1/1/74 649-0724

12:18 p.m. Shapiro to Norm a/k/a Buff

Shapiro calls Buff and tells him that they got a line of —5 on the Texas game. Buff wants to know if that number is still available. Shapiro thinks it is. Buff tells Shapiro of the bets he has and the line he is using on the Ohio State game, the Texas game and the Penn State game.

Blitzstein replaces Shapiro on the telephone. Buff tells him that he needs Texas "for short money." Blitzstein tells Buff that he could get him some Nebraska money, but Buff does not want it. The person who wants to bet on Nebraska bet $6,000 with Blitzstein on Southern California. Blitzstein tells Buff that Texas is the "right side" in its game. Blitzstein tells Buff that "the man out there" play it (Texas). Blitzstein then tells Buff of a number of bets he had on the Ohio State game. Blitzstein tells Buff that "the Southpaw" is playing Texas, but has not bet on the Penn State game. Buff bet on L.S.U. in that game. Blitzstein tells Buff that he wants to stay heavy on Penn State.

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REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW BECAUSE THE TRIAL JUDGE REFUSED TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE AND ON THE DEFINITIONS OF CERTAIN TECHNICAL TERMS AS THOSE TERMS HAVE BEEN DEFINED BY OTHER COURTS.

This is an ideal case for this Court to examine and define the role that a trial judge must assume in the instruction process. While the use of standard jury instructions has been an excellent means for expediting a tedious procedure, the philosophy of instructing a jury engendered by their use can be counterproductive in many cases. The trial judge in the instant case began the instruction conference with the following statement:

> ". . . I subscribe to the general approach in Illinois pattern jury instructions criminal, that we undertake to make the instructions simple, concise, unslanted and in nonpartisan language and brief, impartial, free from argument, neither prosecution oriented or [sic] defense-oriented, free from error and only one instruction on the subject." (Tr. 731)

In applying this philosophy, the trial judge gave instructions to the jury which were simple, concise, free of bias, and brief. Unfortunately, they were also empty of substance and gave virtually no assistance to the jury in attempting to reach its verdict.

The main factual decision for the jury in the instant case was the determination of whether or not the bets made by petitioner's customers were bets made in the

course of petitioner's bookmaking business. The shorthand term for bets made by a bookmaker in the course of his bookmaking business is "lay off bets." If the jury was able to conclude that the customers were transmitting lay off bets for Blitzstein, then it also could conclude that these customers were also "conducting" Blitzstein's business.

If, on the other hand, the jury concluded that the bets were not lay offs—that is, not made in the course of the bookmaking business—then the customers who placed the bets could not be included in Blitzstein's business.

The importance of this determination is that an essential element of the statute—Title 18, United States Code, Section 1955—is that "five or more persons" be involved in the charged operation. In the instant case, the customers had to be included in order that the five or more persons element be satisfied.

Thus, the jury, presumably a group of non-bookmakers, had to decide whether these bets were or were not related to the purposes of the bookmaking business. As in any business, bookmaking has its own unique business practices which are beyond the usual store of knowledge of the average person. Therefore, the critical terms, technical in nature and outside the average juror's experience, had to be authoritatively defined by the court in order that the jury be able to apply the facts to the technical terminology.

In *United States* v. *Young,* 463 F.2d 934, 946 (D.C. Cir. 1972) (Robinson, J., concurring), Judge Spottswood W. Robinson, III, stated:

> "Instructions, then, are vital cogs in the federal judicial machinery. On their coverage and caliber depends the integrity of jury verdicts and, in the long run, the

> worth of the jury system itself. The immediate beneficiaries are, of course, the litigants, and their stake in high quality instructions is obvious. For the very best of reasons, a party is entitled to have the jury instructed on all essential questions of law involved in the case. His is the right of trial by jury, and '[i]t is almost, if not, as important to a [party] to have a jury instructed on the law applicable to his particular case by a judge, who knows the law, as to have a jury of his own peers.' " (Citation omitted.)

The instructing judge's duty to the litigants and the jury does not end at defining the bare elements of the charged offense. *"This duty extends . . . to accurate definitions of words and phrases having technical meanings." United States* v. *Maude,* 481 F.2d 1062, 1075 (D.C. Cir. 1973) (Emphasis added; citations omitted.)

In the instant case, the petitioner and his co-defendants joined in proposing instructions defining the technical term, "lay off bet." Shapiro proposed instruction number nine which was a quotation from *United States* v. *Schaefer,* 510 F.2d 1307, 1311 n. 5 (8th Cir. 1975), *cert. denied,* ..... U.S. ....., 95 S.Ct. 1975, 1980:

> "A 'layoff' bet is a bet or wager placed by one bookmaker with another bookmaker [which is necessitated by the influx[11]] of an imbalance of bets and wagers on a given sporting event and which bet has the effect of distributing the said bets and wagers, thus minimizing the risk of substantial loss."

[11] Due to a typographical error the bracketed portion of this instruction was not included in the proposed version tendered to the court. Had the judge seriously considered giving a definition instruction, this omission would have been discovered and rendered by checking the citation. However, the judge's reason for refusing to define the term was that the experts disagreed on the meaning of "layoff bet." See, *Ullman* v. *Overnite Transportation Company,* 508 F.2d 676, 677 (5th Cir. 1975), *rehearing denied,* 511 F.2d 1402.

Without the jury fully understanding the concept "lay-off bet," this case obviously could not be fairly decided. Both the government and the defendants keyed their arguments to applying the facts to this most important bookmaking practice.

In a very real sense, the issue concerning the term was created by the government's expert himself. The true issue in the case was the function, if any, that the bets placed by Greenspan and Gordon[12] for Blitzstein served for Blitzstein's bookmaking business. If these bets related to the business and were made to balance his bookmaking business, then these bets may be said to have been made "in the course of the business" and Gordon and Greenspan could be said to have been agents of the business. Courts—and bookmakers themselves—have termed bets which serve a balancing function as "lay off bets." This term has *always* been defined in terms of its function and *it is the function, not the term,* that has made lay off bets important in linking separate bookmaking businesses together for the purposes of Section 1955.

The government expert used the same shorthand term to define something completely different—any bet made by a bookmaker *regardless of its function* (Tr. 518-519). But, the prosecutors continued to employ the term in its usual manner—as evidence of a combined operation. Thus, whereas the shorthand term has been accepted to define specific relationships which carried certain implications, the government has attempted to create the same implications merely by employing the term even though the relationships encompassed within the term have been completely altered.

[12] Greenspan and Gordon were customers who placed bets for Blitzstein.

It was only because the government's expert created a new meaning for the term "lay off bet" that the battle was fought over the definition. Perhaps the defense was unwise to take that approach. Perhaps the defense should have accepted the expert's new definition and argued that if all bets between bookmakers are layoff bets, then not all lay off bets are bets made in the course of the bettor's bookmaking business. However, the defense attorneys were experienced in the application of Section 1955 and the defendants themselves understood the bookmaking business. All knew what the term "lay off bet" meant and all had the same reaction to the expert's testimony—"He is wrong! That is not what a lay off bet is!"[13]

Because the government used the term, as newly defined, to raise the same implications that the term raised based on its accepted definition (and, again, it was only the definition that raised the implications, not the term itself), the defendants were entitled to an instruction defining the technical term as the function that raises the implications.[14]

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[13] Every Court of Appeals that has defined the term would have the same reaction as the defendants. See, *United States* v. *McHale, infra; United States* v. *Schaefer, supra; United States* v. *Thomas, infra; United States* v. *Box, infra; United States* v. *Guzak, infra; United States* v. *Sacco,* 491 F.2d 995, 998, n.1 (9th Cir. 1974).

[14] Compare, *United States* v. *Maude, supra,* in which both sides asked the trial judge to instruct the jury on the definition of the word "postmark". His refusal to do so was upheld on appeal because "postmark" had a "widely accepted and familiar meaning" and the proposed instruction "would have added nothing to the jury's store of knowledge." 481 F.2d at 1076. Surely this cannot be said of a term which required expert testimony for definition and analysis. Compare, *Bohn* v. *United States,* 260 F.2d 773, 779 (8th Cir. 1958), *cert. denied,* 358 U.S. 931 and *United States* v. *Crockett,* 506 F.2d 759, 762 (5th Cir. 1975).

To help clarify the same matter for the jury, defendants proposed Shapiro instruction number six:

> "A bet placed by one bookmaker with another bookmaker is not necessarily a wager made in the course of the bettor-bookmaker's business. A 'layoff' bet made by one bookmaker with another may be found to have been a bet made in the course of the betting bookmaker's business. A personal bet made by a bookmaker, [sic] need not be found to have been made in the course of the betting bookmaker's business."

The trial judge refused to give this instruction, but did not explain his reasons. Obviously, the refusal could not have been based on irrelevancy—this instruction defines the main issue of the case. The language is certainly clear in its meaning. For the reasons stated above, this instruction, coupled with the definitional instruction, would have supplied the jury with the needed legal foundation upon which to consider the facts.

In addition to failing to define the technical term, the trial judge refused to define an essential element of the offense. Title 18, United States Code, Section 1955 (b)(1)-(ii), requires that five or more persons must "conduct, finance, manage, supervise, direct, or own all or part of such [gambling] business." The customers, who the government contended were agents of the business as well, could only be so considered based on the verb, "conduct."

The defendants requested that the court instruct the jury on the definition of the element "conduct"—especially in regard to those persons included and excluded from the term—as it has been construed by the courts. The defendants proposed the following instruction to this end.

> "The term 'conducts' does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet."

This proposal was based on *United States* v. *Riehl,* 460 F.2d 454, 459 (3rd Cir. 1972), and is a reflection of intent when the statute was enacted. See, 2 United States Code Cong. & Adm. News (1970), at p. 4029.

The government itself proposed an instruction to define the element. See, G. Inst. 34A, in Appendix D.

Thus, the jury was not specifically instructed that bettors are not to be included in the determination of the essential "five or more" participants.

The instructions actually given to the jury (Appendix C) were not improper. However, they did not adequately inform the jurors of the issues they were to decide. The resultant verdicts were an absolutely bewildering combination which even the Court of Appeals in its affirmance termed, "inconsistent." Frankly, based on the undisputed facts of this case, the verdicts are impossible to explain.

In order to affirm the instant conviction, the Court of Appeals scrutinized and found something wrong with every instruction proposed by the deefndant. (Appendix C) We seriously doubt if any single specific instruction in any case could pass such close muster. No proposed instruction, standing alone, will be a perfect statement of the law. The law is too complex, and too full of exceptions and aberrations, for any one instruction to be fully accurate.

Each proposed instruction was needed because of the complexity of the case and the closeness of the issues.[15] The failure to instruct on particular areas of the law left

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[15] Indeed, in reaching its conclusion regarding the "five or more persons" issue in the instant case, the Court of Appeals felt the necessity of including the two defendants about whom the jury was unable to reach verdicts. Although this may not be legally improper, it certainly highlights the closeness of the case.

the jury with a void as to what factual issues it was to decide. Many of the proposed instructions related to technical terms and concepts, outside the ordinary knowledge of the average jury and which required expert testimony for definition. Other rejected instructions defined essential elements of the offense. The paucity of instructions resulted in a nonsensical combination of verdicts which bore no relationship to the facts of the case. All this, the Court of Appeals chose to ignore.

The ultimate responsibility for instructing the jury rests with the trial judge. If neither the defense nor the prosecution submit proposed instructions, a charge to the jury would still have to be given. If both the defense and the prosecution submit incorrect instructions on a topic which requires instruction, the court still must instruct.

Whoever wrote the instant order chose to overlook the principle of law set forth so clearly in *Williamson* v. *United States,* 332 F.2d 123, 132 (5th Cir. 1964).

> "In the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge."

The Court of Appeals uses as a justification for no instruction defining a lay off bet, "the peculiar circumstances of this case." Yet no mention is made that these peculiar circumstances were originated by the government's expert, who tailored the term lay off bet to suit the prosecutor's needs.

In *United States* v. *Schilleci,* 545 F.2d 519, 523-524 (5th Cir. 1977), defendant's convictions were reversed because of the insufficiency of the charge to the jury. Throughout the trial in *Schilleci,* the defendant had based his defense on lack of specific intent. The instruction given by the trial court on that subject failed to properly and com-

pletely define the factors the jury was to consider in reaching its conclusion regarding specific intent.

In the instant case, though requested by the defendant, the trial judge failed to instruct the jury on the factors it was to consider in reaching a decision on the essential element "conduct." The defendant based his case on the failure of the government to prove that five or more persons *conducted* one bookmaking business. That the jury was not instructed on that element is error of the same type as that causing reversal in *Schilleci*.

This court's conclusion that there was no error because the defendant's proposed instructions were not perfect ignores the basic issue of whether the instructions actually given were sufficient. What this court's order does is to completely insulate the trial judge from the instruction formulation process. According to the order, if perfect instructions on an essential element are not proposed, no instruction on that essential element need be given. This radical departure from established law is worthy of ultimate review.

CONCLUSION

WHEREFORE for the foregoing reasons, this Court should issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to review the instant judgment.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued January 12, 1977)

February 4, 1977

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. William G. East, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 76-1772 vs.

HERBERT BLITZSTEIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 744
Alfred Y. Kirkland, *Judge*.

ORDER

Defendant Herbert Blitzstein was convicted by a jury of conducting an illegal gambling business in violation of 18

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* The Honorable William G. East, Senior District Judge of the United States District Court for the District of Oregon, is sitting by designation.

U.S.C. § 1955. On appeal, he argues that the evidence was insufficient to meet the jurisdictional requirement that five or more persons be involved in the operation of that business and that the jury was not properly instructed as to that element of the offense. We affirm.

On appeal, defendant concedes that he and his co-defendants, Goldman and Shapiro, were conducting an illegal bookmaking operation that took primarily football bets. He argues, however, that the evidence was insufficient to show that there were two other persons "conducting" that business. Viewing the evidence, as we must, in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60 (1942), we cannot agree. There was sufficient evidence that at least two other persons, James Rittenberg and Irving Gordon, participated in the conduct of that business.

Rittenberg, a nightclub owner, testified at trial that he regularly acted as an intermediary on behalf of a few friends and customers in placing bets with Blitzstein's operation. During football season, these bets would ordinarily total $8,000 or $10,000 per week. In arranging the bets, Rittenberg would use a point spread provided him by Shapiro; he would then relay the bets to Shapiro, using numbers instead of names in order to keep his customers' identities secret. Rittenberg testified that all the bets he received were placed through Shapiro, although he acknowledged that he might have gone to another bookmaker once or twice.

In his brief, defendant argues that Rittenberg was not the type of person the statute was intended to cover. Yet this court has stated that

> "'. . . Congress' intent was to include all those who participate in the operation of a gambling business, regardless [of] how minor their roles and whether or not they [are] labelled agents, runners, independent contractors or the like, and to exclude only customers of the business.'"

United States v. *McHale,* 495 F.2d 15, 18 (7th Cir. 1974), quoting from *United States* v. *Becker,* 461 F.2d 230, 232 (2d Cir. 1972), *vacated and remanded on other grounds,* 417 U.S. 903 (1974). The evidence was sufficient to show that Rittenberg was "more than [an] individual player or bettor and consciously aided in the conduct of the . . . bookmaking operation." *United States* v. *Joseph,* 519 F.2d 1068, 1072 (5th Cir. 1975), *cert. denied,* 424 U.S. 909 (1976). Therefore, under the definition this court has adopted, he could be counted as one of the participants in the illegal operation.

Gordon, who also testified at trial, was a businessman who placed bets both with Blitzstein and for him. Gordon testified that during the football season he would place bets for Blitzstein with other bookmakers on ten to fifteen games a week, betting $300 to $1,500 per game. He received his instructions on what bets to place from Goldman and Shapiro, as well as from Blitzstein, to whom he talked five to ten times a week. Gordon also testified that, in addition to placing bets for Blitzstein with other bookmakers, he would receive bets to be transmitted to Blitzstein once or twice a week when customers were unable to reach Blitzstein by phone.

Defendant argues that Gordon was simply a customer who did him the favor of helping him place personal bets. He arrives at this conclusion by comparing himself with the typical bookmaker. Defendant contends that a bookmaker is, by definition, not a gambler, but rather a person who seeks to minimize his risk by equalizing bets on each side of a contest. When a bookmaker receives too many bets on one side, he tries to balance his ledger by "laying off," *i.e.,* shifting some of those bets to another bookmaker.

Therefore, defendant argues, any wager by a bookmaker that is not intended to achieve a balance cannot be called a lay-off, cannot have been made in the course of the bookmaker's business, and can only be characterized as a personal bet.

After thus setting forth the operating principles of an ordinary bookmaking business, defendant goes on to describe his own method of doing business. Instead of trying to balance his incoming bets, Blitzstein always tried to take a "position" favoring one side or the other. Because he often had "inside" information and because he considered himself a sharp player, Blitzstein was willing to disregard the sure profit a bookmaker derives from the 10% "vigorish" losing bettors pay and greatly increase his risk of loss. The evidence showed that in trying to attain a favorable position, the defendant sometimes manipulated his betting line to encourage his customers to bet on the losing side; more commonly, however, he would simply place bets with other bookmakers, often through agents like Gordon.

At trial, the government's expert witness characterized Blitzstein's bets as "lay-offs" made in the course of his bookmaking business. Defendant argues, as his expert testified at trial, that this characterization was wholly at odds with the realities of the bookmaking business, as set forth above. Because they were not placed to achieve an even balance, defendant contends that Blitzstein's bets were strictly personal and, in fact, were made in spite of his bookmaking business.

We find defendant's argument unpersuasive. First, even assuming that Blitzstein's bets were not business related, Gordon's contacts with the bookmaking operation were more than those of a mere customer. Like Rittenberg, he acted as an intermediary, relaying bets on a regular basis

for gamblers who were unable to contact Blitzstein directly. Second, we cannot agree with defendant's restrictive definition of a "lay-off" bet. While that definition may be technically correct as a matter of general bookmaking parlance, it is not a complete definition of the term as it is used in the case law, *i.e.*, as a short-hand expression for a bet made in the course of a bookmaker's business. *Cf. United States* v. *Turzitti*, No. 76-1434 (7th Cir., Jan. 3, 1977). In the case at bar, the evidence presented was sufficient to allow the jury to conclude that the large and frequent bets Blitzstein placed through Gordon and others were not personal bets. The evidence showed that these bets were not segregated in any way from Blitzstein's regular bet-taking operation: they were placed over the same office phone, sometimes by Goldman or Shapiro, no separate accounts were kept, and Goldman often handled their weekly settlement and collection. It also showed that these bets were a function of the office figures: that is, when the incoming bets put Blitzstein in what he considered to be an unfavorable position, he would attempt to remedy the situation by placing bets with other bookmakers. At times Blitzstein would also attempt to accomplish the same result by adjusting his betting line. We see no basis for distinguishing between the latter procedure, which was clearly employed in the course of the bookmaking business, and the former, as both of them were directed toward the same objective of increasing that business' profit-making potential.

Defendant's second argument is that the trial court erred in refusing to give a number of requested instructions. Defendant contends that the cumulative effect of these refusals was to leave the jury without any guidance on the proper application of § 1955. This lack of guidance, he says, was responsible for producing a "bewildering combination of verdicts," with Blitzstein being convicted,

the jury unable to agree as to Goldman and Shapiro, and Malmenato (allegedly an agent like Gordon) being acquitted.

We find that the trial court's instructions did adequately explain the elements of the offense charged. In reaching this conclusion, we have not considered the apparently inconsistent verdicts returned by the jury, for, as Judge Hastings said in *United States* v. *Kotakes,* 440 F.2d 342, 345 (7th Cir.), *cert. denied,* 403 U.S. 919 (1971), such an exercise would be "pure speculation."

Defendant argues that the court should have instructed the jury to accept its definition of a lay-off bet, set forth above. (Shapiro's proposed instruction #9.) As we have already pointed out, however, this definition was not complete. Moreover, under the peculiar circumstances of this case, any further elaboration on that term would have confused, rather than clarified, the central issue of whether the bets made by Blitzstein were personal or were bets made in the course of his bookmaking business. In instructing the jury on the defendants' various theories of the case, the court formulated the issue in precisely these terms and thus properly left it to the jury to determine whether the bets were, as defendant contended, "unrelated to the bookmaking operation." (Court's instructions, defendant's appendix at 10.)

We find that the court also acted within its discretion in refusing a number of other requested instructions. Shapiro's proposed instruction #6, which attempts in a somewhat confusing manner to distinguish between personal bets and bets made in the course of business, was adequately covered in the court's summary of the various theories of defense. Shapiro's proposed instruction #7, which states that placing a bet for someone else does not

make a person a participant for purposes of the five-man requirement, is an incorrect statement of law. See *United States* v. *McHale, supra,* 495 F.2d at 18. Shapiro's proposed instruction #3, which states that a bettor is not to be counted toward the five-man requirement, was adequately covered in the court's instructions regarding defendant Malmenato's theory of defense. Shapiro's proposed instructions 5 and 8 and Malmenato's proposed instruction #3 all state, in effect, that, in order to be included as a participant in a gambling operation, a person's contacts with that operation must be more than casual, isolated instances. While the court did not instruct the jury directly on this point, he did say that whether a "business" existed depended on, among other things, whether "a continuing course of conduct rather than a single isolated transaction" was involved. (Defendant's appendix at 8.) We think this instruction was sufficient. But, even if it were not, the failure to instruct further would not be prejudicial error because it was undisputed that all but two of the ten men who were possible participants had very frequent non-betting contacts with the Blitzstein operation. Finally, Shapiro's proposed instruction #4, which states that a large-scale bettor must be treated the same as a small bettor, was properly refused in this case, because the size of Blitzstein's allegedly personal bets was one factor that the jury was entitled to consider in determining whether they were actually bets made in the course of his bookmaking business.

For the foregoing reasons, the conviction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 24, 1977.

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. William G. East, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 76-1772 vs.

HERBERT BLITZSTEIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 CR 744
Alfred Y. Kirkland, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for rehearing in the above-entitled cause be, and the same is hereby Denied.

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* The Honorable William G. East, Senior District Judge of the United States District Court for the District of Oregon, is sitting by designation.

APPENDIX C

The Instructions Given by the Court

(Whereupon, the following further proceedings were had in the presence and hearing of the jury; to-wit:)

The Court: This jury has been exceptionally attentive throughout this trial and before I give you the instructions to guide you in the jury room, I will make some general comments that might be helpful to you. The written instructions—printed instructions—will not go to the jury room; likewise the record in this case will not go to the jury room. I know from experience that many times the foreman of the jury will knock on the door after some deliberation and say, "Could you tell us again the testimony of such-and-such a witness," or, "Could we read the indictment," or "Could we see this instruction or that instruction." None of that will be available to you. We ask you to—and the purpose of having a jury is for you to draw your twelve collective memories as to what the evidence was, as to what a particular witness testified to, as to what was demonstrated by this, that or the other witness. Likewise the instructions should be regarded as a whole, and you will again be asked when you are in the jury room to rely upon your respective and collective memories as to what the instructions were. That is incentive enough to listen carefully. Watching this jury, you have listened carefully and do not need to be told this; but I will remind you again that you will not get to read a record of the case while you are deliberating, you will not get to see the instructions in print or to have them read to you. So do listen carefully; and, I think, you will find that when you are in the jury room deliberating, your

collective memories will recall the significant information, the significant instructions on which you must draw and which you must use to decide this case.

In the trial of this case the Judge and the jury have separate functions. The Judge is in charge of the trial and must preside in such manner that proper and relevant evidence will be presented, and should instruct the jury on the law applicable to the case.

The jury should follow the law as it is given by the Judge in these instructions. All of the instructions should be considered together as a connected series and regarded as the law applicable to the case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law.

The function of the jury is to determine the facts. This should be done without prejudice, fear or favor, and solely from a fair consideration of the evidence. The evidence should be considered and viewed by the jurors in the light of their own observations and experiences in the affairs of life. If, during the trial, the Court has intimated an opinion as to the facts, the jury is not bound by that opinion. The jury alone is the sole and exclusive judge of the facts.

In determining the facts, the jury is reminded that before each member was accepted and sworn to act as a juror, he was asked questions regarding his competency, qualifications, fairness and freedom from prejudice or sympathy. On the faith of those answers, the jury was accepted by the parties. Therefore, those answers are as binding on each of the jurors now as they were then, and to remain so until the jury is discharged from consideration of this case.

A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

The burden of proving defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on cross examination of witnesses for the Government. If the Government fails to prove defendant guilty beyond a reasonable doubt the jury must acquit him.

The indictment is not evidence of defendant's guilt. It is merely the formal manner by which the Government accuses a person of a crime in order to bring him to trial. The jury must not be prejudiced against a defendant because an indictment has been returned against him. Each defendant has pleaded not guilty to the indictment.

The jury must consider only the evidence properly admitted in the case. Evidence includes the sworn testimony of witnesses, exhibits admitted into the record, facts stipulated by counsel, and facts judicially noted by the Court.

A stipulation in an agreed statement of facts between the attorneys for the prosecution and the defendant, and the jury should regard such stipulated facts as undisputed evidence.

Statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties. During the course of the trial it often becomes the duty of counsel to make objections, and for the Court to rule on them in accordance with the law. The jury should not consider or be influenced by the fact that such objections have been made.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence; it requires only that the jury after weighing all the evidence, must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted.

Testimony and exhibits to which the Court has sustained an objection, or which the Court has ordered stricken from the record, do not constitute evidence, and must not be considered by the jury.

It is the province of the jury to determine the credibility of each witness and the weight to be given to his testimony. In weighing the testimony of each witness, the jury should consider his relationship to the Government, or to the defendant; the witnesses interests, if any, in the outcome of the case, his manner of testifying, his candor, fairness and intelligence, and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence.

If the jury believe that a witness has willfully sworn falsely to a material fact in the case, the jury may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. The jury should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. The jury may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The

earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of those statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

During this trial the jury has heard the testimony of alleged expert witnesses. Such evidence is admissible where the subject matter involved requires special study, training or skill not within the realm of the ordinary experience of mankind, and the witness is qualified to give an expert opinion.

However, the fact that an expert opinion is given does not mean that it is binding upon the jury, or that the jury is obligated to accept the expert's opinion as to what the facts are. It is the province of the jury to determine the credibility and weight that should be given to the expert opinion in the light of all the evidence.

To constitute a crime there must be the joint operation of two essential elements, an act forbidden by the law and an intent to do the act.

Before a defendant may be found guilty of a crime, the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions defendant was forbidden to do the act charged in the indictment, and that he intentionally committed the act.

The indictment charges that from on or about September 1, 1973, and continuing to and including on or about January 9, 1974, in the Northern District of Illinois, Eastern Division, and elsewhere, Herbert Blitzstein, Sherman Goldman, Michael Malmenato and Morton Shapiro, defendants herein, and Norman Mizelle, Irving Gordon, Edwin Greenspan and James Rittenberg, named herein but not as defendants, and others whose names are unknown to

the grand jury, did knowingly, willfully and unlawfully, conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business, such business having been in substantially continuous operation for a period in excess of thirty days and having a gross revenue of $2,000.00 or more on one or more single days, in involving five or more persons in its conduct, financing, management, supervision, direction and ownership, and being in violation of the laws of the State of Illinois, that is: Illinois Revised Statutes, Chapter 38, Sections 28-1(a)(2) and (10); and 28-1.1(b) and (d).

In violation of Title 18, United States Code, Section 1955.

To convict a defendant of the crime charged in this indictment, the Government must prove beyond a reasonable doubt:

1. That within a time set out in the indictment, in the Northern District of Illinois, the defendant knowingly, willfully and unlawfully conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business;

2. That the illegal gambling business was in violation of the law of the State of Illinois;

3. That the illegal gambling business involved five or more persons in its conduct, financing, management, supervision, direction or ownership; and

4. That the illegal gambling business had been in substantially continuous operation for a period in excess of thirty days or had a gross revenue of $2,000.00 or more on one or more single days.

Defendants have been charged with violating Title 18, United States Code, Section 1955. The Statute provides in pertinent part:

(a) "Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall" be guilty of an offense.

The statute continues:

(b) As used in this section

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of (the) State . . . in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such (a) business and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day.

(2) "gambling" includes bookmaking . . .

The term "business" is to be given its normal, customary meaning and is to be found from the circumstances of the case. For example, you may consider among other things the defendants' intent, the volume of the business, the scope and the size of the gambling activity, and whether it is conducted for a profit. As a general rule, a business enterprise involves a continuing course of conduct rather than a single isolated transaction.

The gambling business alleged to have been carried on by the defendants is a bookmaking operation involving 5 or more persons, having been in substantially continuous operation for a period in excess of thirty days or having a gross revenue in excess of $2,000.00 in any single day from on or about September 1, 1973 to on or about Janu-

ary 9, 1974. If you, the jury, find beyond a reasonable doubt that the defendants did conduct, finance, manage, supervise, direct or own such a gambling business, then I instruct you, as a matter of law, that such activity violates the laws of the State of Illinois as provided in Sections 28-1(a), (2) and (10); and Section 28-1.1(b) and (d), of Chapter 38, Illinois Revised Statutes.

The word "knowingly" as used in the crime charged means that the act was done voluntarily and purposely, and not because of mistake or accident. Knowledge may be proven by defendant's conduct, and by all the facts and circumstances surrounding the case.

The word "willfully" as used in the crime charged means that the act was committed by defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or in good faith.

Where two or more persons are charged with the commission of a crime, the jury must give separate consideration to each individual defendant. Each defendant is entitled to have his case determined from his own conduct and from the evidence which may be applicable to him.

It is the defendant Blitzstein's theory of defense that his relationships with other persons were not such that he was associated with four or more others in the operation, conduct, management, financing, ownership, or direction of a single bookmaking business as prohibited by the statute.

It is the defendant Blitzstein's further theory of defense that he was engaged in two separate and distinct ventures, one which, if engaged in with five or more persons in the operation, conduct, management, financing, ownership, or direction, would be in violation of the law, to wit: bookmak-

ing; and the other distinct venture, which would not be in violation of the federal statute, to wit: betting, regardless of the number of people with whom Blitzstein may have associated.

It is the defendant Blitzstein's further theory of defense that the bets made by him were not made in furtherance of the bookmaking operation, but rather were made in furtherance of his betting activity.

It is the defendant Goldman's theory of defense that he was not a member of a gambling business which was conducted, financed, managed, supervised, directed or owned by five or more persons.

It is the defendant Goldman's further theory of defense that the wagers made by the defendant Blitzstein were personal bets made in Blitzstein's capacity as a bettor and that these wagers were not connected with Blitzstein's bookmaking activities.

It is the defendant, Malmenato's theory of defense that his relationship with other persons was not such that he was associated with four or more others in the operation, conduct, management, financing, ownership, or direction of a gambling business as defined in the statute.

It is the defendant Malmenato's further theory of defense that he was a bettor only and that he placed bets with other bookmakers which he and the co-defendant, Blitzstein, split without any connection to the bookmaking business of Blitzstein.

If you find either of these propositions to be true, you should find the defendant, Malmenato, not guilty.

It is the defendant Shapiro's theory of defense that his relationship with the other persons named in the indictment was not such that he was associated with four others

in the operation, conduct, management, financing, ownership, or direction of a single gambling business as defined in the statute.

It is the defendant Shapiro's further theory of defense that the bets made by Shapiro and the co-defendant Blitzstein were not made in furtherance of the bookmaking operation in which it is alleged that Shapiro was a partner with Blitzstein.

It is the defendant Shapiro's further theory of defense that there were two separate gambling operations shown by the evidence—one in which there was bookmaking (accepting bets) and a separate one in which the defendant Blitzstein was placing bets and that the bets placed by Blitzstein were unrelated to the bookmaking operation.

Upon retiring to the jury room you will select one of your number as foreman who will preside over your deliberations. During the course of your deliberations you should assume the attitude of judges of the facts rather than that of partisans or advocates.

In determining the guilt or innocence of the defendants the jury should not give any consideration to the matter of punishment, for this question is exclusively the responsibility of the judge.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so

only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

You will take with you to the jury room eight forms of verdict. Each of the eight forms of verdict have a space for the twelve signatures. The line above which the foreman should sign and eleven other lines above which the other eleven jurors should sign. You should return four verdicts from the eight forms given to you. The forms read as follows: "We the jury find the defendant Herbert Blitzstein guilty as charged in the indictment. We the jury find the defendant Herbert Blitzstein not guilty as charged in the indictment." Return one or the other of those verdicts.

"We the jury find the defendant Sherman Goldman guilty as charged in the indictment. We the jury find the defendant Sherman Goldman not guilty as charged in the indictment." Return one or the other of those verdicts.

"We the jury find the defendant Michael Malmenato guilty as charged in the indictment. We the jury find the defendant Michael Malmenato not guilty as charged in the indictment." Return one or the other of those verdicts.

"We the jury find the defendant Morton Shapiro guilty as charged in the indictment. We the jury find the defendant Morton Shapiro not guilty as charged in the indictment." Return one or the other of those verdicts.

Again, before verdicts are returned they should be signed by all twelve jurors.

At this time I will excuse the alternate juror and assure him and reassure him that his participation has been important to this trial and it saved what could have been a necessity of trying this entire case over again if we had lost more than two jurors along the way, as we lost one because of illness. So the alternate juror may step down at this time and his service is completed and we thank you for your service.

The clerk will administer the oath to the marshal.

(Marshal sworn.)

APPENDIX D

Refused Instructions

GOVERNMENT INSTRUCTION NO. 34

The word "five or more persons who conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business" include all of those individuals who associate themselves with the business in any capacity other than in the capacity of a mere customer or bettor. These words include all those who participate in the gambling business regardless of how minor their roles and whether or not they act as runners, pick up men, office workers, telephone operators, layoff bettors or any other position.

United States v. *Mullen,* 516 F.2d 591 (7th Cir. 1975);
United States v. *McHale,* 495 F.2d 15, 18 (7th Cir. 1974);
United States v. *Manson,* 494 F.2d 804, 807 (7th Cir. 1974);
United States v. *Hunter,* 478 F.2d 1019, 1021-22 (7th Cir. 1973), *cert. den.* 414 U.S. 857, *reh. den.* 414 U.S. 1087.

GOVERNMENT INSTRUCTION NO. 35

Each defendant is to be considered separately, but the essence of the law that the government must prove beyond a reasonable doubt that the individual defendant that you are considering was involved in the illegal gambling business with four or more other persons, some of whom may or may not have been named as defendants.

It is not necessary for the government to prove that each defendant or participant in the illegal gambling busi-

ness know or had reason to know of the identities of the other defendants or participants in said business or that five or more persons were involved in said business.

United States v. *Pepe,* 512 F.2d 1129, 1131 (5th Cir. 1975)

DEFENDANT SHAPIRO'S INSTRUCTION NO. 3

The term "conducts" does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

United States v. *Riehl,* 460 F.2d 454, 459 (3rd Cir. 1972)

2 United States Code Cong. & Admin. News (1970), at p. 4029

DEFENDANT SHAPIRO'S INSTRUCTION NO. 4

A person who regularly places large bets is not treated any differently by the law than a casual and occasional bettor.

United States v. *Box,* 530 F.2d 1258 (5th Cir. 1976)

DEFENDANT SHAPIRO'S INSTRUCTION NO. 5

The mere exchange of line information does not make the persons who exchange such information joint operators, managers, directors, financers, or owners in the same gambling operation.

United States v. *Guzek,* 527 F.2d ..... (Cir. 1976)

United States v. *Box,* 530 F.2d 1258 (5th Cir. 1976)

DEFENDANT SHAPIRO'S INSTRUCTION NO. 6

A bet placed by one bookmaker with another bookmaker is not necessarily a wager made in the course of the bettor-bookmaker's business. A "lay-off" bet made by one bookmaker with another may be found to have been a bet made in the course of the bettor's bookmaking business. A personal bet made by a bookmaker, need not be found to have been made in the course of the betting bookmaker's business.

United States v. *Joel Glickman, et al.,* No. 75 CR 666 (N.D.Ill. 1976), (given by Judge Decker)

DEFENDANT SHAPIRO'S INSTRUCTION NO. 7

The placing of a bet for someone else does not make a person a participant in a gambling enterprise for purposes of satisfying the "five or more persons" requirement of the offense charged in this case.

United States v. *Pepe,* 512 F.2d 1129, 1131, N.7 (3rd Cir. 1975)

DEFENDANT SHAPIRO'S INSTRUCTION NO. 8

Isolated and casual layoff bets and an occasional exchange of line information is not sufficient to establish that one bookmaker is conducting or financing the business of a second bookmaker.

United States v. *Thomas,* 508 F.2d 1200, 1206 (8th Cir. 1975), *cert. denied,* 95 S. Ct. 1677.

DEFENDANT SHAPIRO'S INSTRUCTION NO. 9

A "layoff" bet is a bet or wager placed by one bookmaker with another bookmaker of an imbalance of bets and wagers on a given sporting event and which bet has the effect of distributing the said bets and wagers, thus minimizing the risk of substantial loss.

United States v. *Schaefer,* 510 F.2d 1307, 1311, N.5 (8th Cir. 1975), *cert. denied,* 95 S. Ct. 1975, 1980

DEFENDANT SHAPIRO'S INSTRUCTION NO. 10

You may not speculate or use generalized theories about how bookmakers and bettors receive line information in order to determine that such methods occurred in this case.

Unless there is evidence to support the conclusion that line information was transmitted by a specific person, you may not conclude that such a person exists nor include such a person for the purpose of determining whether or not the "five or more persons" element has been satisfied by the government beyond a reasonable doubt.

United States v. *Pepe,* 512 F.2d 1129, 1133, 1134 (3rd Cir. 1975)

DEFENDANT MALMENATO INSTRUCTION NO. 3

If you find that a defendant accepted lay off bets without finding that he was an integral part of the bookmaking business you must find him not guilty.

18 USC Section 1955
U.S. v. *Box,* 530 F.2d 1258 (1976).

DEFENDANT GOLDMAN'S INSTRUCTION NO. 2

The recipient of a lay off bet is not a part of an illegal gambling operation on that basis alone.

United States v. *Box,* 530 F.2d 1258 (5th Cir. 1976).

GOVERNMENT INSTRUCTION NO. 34A

The words "five or more persons who conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business" include all of those individuals who associate themselves with the business in any capacity other than in the capacity of placing personal bets.

United States v. *Mullen,* 516 F.2d 591 (7th Cir. 1975);
United States v. *McHale,* 495 F.2d 15, 18 (7th Cir. 1974);
United States v. *Manson,* 494 F.2d 804 (7th Cir. 1974);
United States v. *Hunter,* 478 F.2d 1019, 1021-22 (7th Cir. 1973), *cert. den.* 414 U.S. 857, *reh. den.* 414 U.S. 1087.